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In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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Diane E. Herz, *Work After Early Retirement: An Increasing Trend Among Men*, Monthly Labor Review, Vol. 118, No. 4, April 1995 18

Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, Monthly Labor Review, Vol. 123, No. 10, October, 2000 ..... 18, 19

Ed Slott, THE RETIREMENT SAVINGS TIME BOMB (Penguin Books 2003). 19

Interest of the *Amicus*[1]

The National Employment Lawyers Association ("NELA") and its 67 state and local affiliates have a membership of over 3,000 attorneys. NELA is the nation's only professional membership organization of lawyers who represent employees in labor, employment, and civil rights disputes. NELA supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the interpretation and application of the Employee Retirement Income Security Act ("ERISA") to ensure that the rights of workers are protected. For example, NELA participated in filing *amicus curiae* briefs in this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

In NELA's view, ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), protects employees who earn benefits under a defined set of terms and conditions against the subsequent imposition of more restrictive conditions on the availability of those benefits. Like anyone else, employees who participate in company and union-sponsored pension plans need to be able to plan their futures knowing that their ability to earn additional needed income after retirement will not be restricted by later plan amendments. NELA members represent participants in both single-

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no person or entity other than amicus curiae and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Petitioner and Respondent filed a joint consent to the filing of amicus briefs with the Clerk of this Court.

employer and multiemployer pension plans who have an interest in preserving the protection of ERISA's anti-cutback rule.

For these reasons, *amicus* respectfully requests that the Court consider its views in support of the Respondents.

Summary of Argument

The Respondents, Thomas Heinz and Richard Schmitt, both worked in the construction industry and earned credits toward pensions in a multiemployer pension plan administered by the Central Laborers' Pension Fund ("the Plan"). *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 803 (7th Cir. 2002). The Plan's rules allowed participants to retire with *unreduced* pensions at any age once they accrued at least 30 pension credits.[2] When Respondents accrued these credits and at the time they retired, the Plan terms permitted participants to receive pension benefits while working in other jobs in the construction industry, so long as they did not work as construction laborers in any job classification covered by a collective bargaining agreement or in any occupation or job classification requiring contributions to the Plan. *Id.* at 803. Relying on this rule, Heinz and Schmitt retired in 1996 and then went to work as *supervisors*, *id.*—a common practice in a variety of industries where multiemployer plans are prevalent. Supervisory positions are not even eligible to be covered by the Plan. Consequently, at the time Heinz and Schmitt accepted supervisory positions, the terms of the Plan permitted them to work in these

[2] Because the Plan allowed accrual of more than one pension credit per year, Heinz and Schmitt had each earned 30 or more pension credits by the time they retired even though they were both relatively young. *Heinz*, 303 F.3d at 803.

positions and receive their pension benefits. However, in 1998, the Fund amended its rules to provide for suspension of pension benefits while a retiree is employed in the construction industry in any capacity. *Id.* By its terms, this amendment ("the 1998 Amendment") applied not only prospectively, but to benefits accrued by Plan participants before the amendment went into effect. *Id.* at 804 n. 2.

Like the Plan here, many multiemployer plans contain rules that suspend payments of early or normal retirement benefits if a participant is re-employed in a job that is covered, or could be covered, by the plan. The statutory and equitable problems arise when the suspension of benefit rules are expanded and the new rules are applicable to benefits that a retired plan participant already has earned under the pre-amendment terms of the plan. In this instance, it is undisputed that the Plan expanded the definition of prohibited re-employment (to encompass any re-employment in the construction industry, including supervisory positions) *after* Heinz and Schmitt earned their rights to receive benefits, retired, and began receiving those benefits. *Id.* at 803-04.

ERISA's anti-cutback rule prohibits a plan amendment that "has the effect of . . . reducing an early retirement benefit." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2). A straightforward reading of the statutory text, faithful to the statute's purpose of protecting employees' anticipated benefits, demonstrates that a plan amendment that retroactively narrows the types of permissible post-retirement employment in which retirees may engage without losing their pension benefits violates ERISA's anti-cutback rule because it "has the effect of . . . reducing" early retirement benefits. *Id.* The implementing regulations issued by the Secretary of Treasury specifically provide that plans may not be amended to add "conditions restricting the availability of a . . . protected benefit." 26 C.F.R. § 1.411(d)-

4, Q&A 7. In short, early retirement benefits are "protected benefits" and a plan cannot be amended to impose additional limitations on post-retirement employment for early retirees because such amendments restrict the availability of the protected benefits.

The narrow issue before this Court is whether the Plan's 1998 Amendment has the effect of reducing benefits for participants, such as Respondents Heinz and Schmitt, who have already retired and commenced receiving early retirement pensions. *Heinz*, 303 F. 3d at 805. Petitioner and its *amici* invite the Court to opine on the question of whether a plan may change suspension of benefits rules applicable to the accrued benefits of participants who have not retired. If the Court reaches this question, NELA believes that the anti-cutback rule logically and properly applies to all benefits accrued before the amendment. Indeed, as amended by the Retirement Equity Act of 1984 ("REA"), ERISA § 204(g)(2), 29 U.S.C. § 1104(g)(2), specifically protects rights to early retirement benefits "attributable to service before the amendment," i.e., even before the employee fulfills all of the conditions necessary for early retirement. *See, e.g., Dade v. North Am. Philips Corp.*, 68 F.3d 1558, 1562 (3d Cir. 1995) (stating that ERISA § 204(g)(2) protects "benefits attributable to service before the amendment" so long as the participant eventually "grows into" entitlement to the benefit, although holding that the plan in question had not been amended). Thus, if a plan adopts a more restrictive prohibited re-employment rule after a participant, for example, has worked 29 of the 30 years necessary for receipt of an unreduced early retirement benefit, that rule may only be applied to the additional benefits accrued in the participant's subsequent year(s) of employment. If the employee retires 1 year after the amendment, the plan may permissibly apply the more restrictive suspension rule to that portion of the benefit attributable to this last year of employment, but it may

not apply the more restrictive rule to that portion of the benefit attributable to the 29 pre-amendment years.[3]

Retirees increasingly work in new positions while receiving retirement benefits. Whether this trend is the result of economic necessity or other factors, the fact remains that during the years when they are accruing benefits in pension plans that promise to allow post-retirement work, they plan their retirements in anticipation of being able to work at other jobs subject to the plan rules in effect during the planning process. Plans must not be allowed to change the rules on these employees after having created statutorily protected and justifiable expectations.

Argument

I. Expanding the Rules for Suspending Payments of Early Retirement Benefits Restricts the Availability of Benefits in Violation of ERISA's Anti-Cutback Rule.

As originally enacted in 1974, ERISA's anti-cutback rule provided that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). In the

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[3] Indeed, one *amicus* posits exactly this type of rule, but complains that it would be unfair to plans because, *inter alia*, it would not enable plans to solve funding deficiencies. *See* Brief of the Central States, Southeast and Southwest Areas Pension Fund as *Amicus Curiae* in Support of Petitioner at 8. However, as discussed in Section I, below, Congress expressly provided a mechanism by which a plan in dire financial straits may apply for permission to effectuate a retroactive reduction in accrued benefits. Nothing in ERISA authorizes plans to change their suspension rules to perform this function, and, as discussed in Section III below, the actuarial and other arguments advanced by *amici* for Petitioner are unpersuasive.

ensuing years, the circuits divided on whether this protection covered both early and normal retirement benefits or only normal retirement benefits. *Compare Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985) (protecting both normal and early retirement benefits), *with Bencivenga v. Western Pa. Teamsters Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985). In 1984, the rule was modified by the REA to clarify that "a plan amendment which has the effect of . . . reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2), as amended by Pub. L. No. 98-397, 98 Stat. 1426 (1984).

Importantly, Congress offers hardship procedures under ERISA §§ 302(c)(8) and 4281, 29 U.S.C. §§ 1082(c)(8) and 1441, by which plans in dire financial straits may seek approval from the Secretary of the Treasury to adopt amendments, even retroactive ones, that reduce accrued benefits, including early retirement benefits. Factors considered in determining business hardship under ERISA §§ 302(c)(8) and 4281, 29 U.S.C. §§ 1082(c)(8) and 1441, include, but are not limited to, whether: "the employer is operating at an economic loss"; "there is substantial unemployment or underemployment . . . in the industry"; "the sales or profits of the industry concerned are depressed or declining"; "it is reasonable to expect the plan will be continued only if a waiver is granted." However, the Petitioner does *not* contend that it was facing sufficient financial hardships to justify such an amendment under the procedures offered in the statute.

A. The Central Laborers' Amendment to Its Rules for Suspending Benefits Plainly Had the Effect of Reducing Early Retirement Benefits Because It Added Conditions that Restrict the Availability of Those Benefits.

Because Heinz and Schmitt were entitled to receive accrued pension benefits before the 1998 Amendment, and were not entitled to continue to be paid those benefits as a result of the amendment, the amendment "has the effect of . . . reducing" their early retirement benefits. ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2). Although the Seventh Circuit's decision relies principally on a straightforward reading of the text of ERISA, it also finds support in the Secretary of Treasury's regulations interpreting the anti-cutback rule. In 26 C.F.R. § 1.411(d)-4, Q&A-7,[4] the question is asked:

> May a plan be amended to add . . . conditions restricting the availability of a section 411(d)(6) protected benefit?

The answer is unequivocal:

> No. The addition of . . . objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6).

26 C.F.R. § 1.411(d)-4, Q&A-7. *See Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-28 (9th Cir.

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[4] Section 411(d)(6) is the Internal Revenue Code analog to ERISA Section 204(g). It contains identical language regarding amendments which have the effect of reducing early retirement benefits. *Compare* 26 U.S.C. § 411(d)(6) *with* 29 U.S.C. § 1054(g)(2).

2001) (finding that the conditions for receipt of early retirement benefits are "[a] valuable component of those benefits").[5]

There should be no serious dispute that the 1998 Amendment added "conditions restricting the availability" of Heinz and Schmitt's early retirement benefits. 26 C.F.R. § 1.411(d)-4, Q&A-7. Before the 1998 Amendment, those benefits were available if Respondents worked in supervisory positions; afterwards, they were not available if Respondents worked in those positions.

Based on the IRS anti-cutback regulation, the Seventh Circuit decided that

> [a] participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.
>
> . . .
>
> Although with a suspension the interruption in payments is temporary, the retiree never recovers the payments lost during the employment period.

Heinz, 303 F.3d at 805-06. Thus, the 1998 Amendment reduced Heinz and Schmitt's "early retirement benefits by expanding the conditions triggering a suspension of benefit payments." *Id.* at 813. Because the 1998 Amendment

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[5] Even Judge Paez, who dissented from the holding in *Michael*, agreed that in making a determination of whether or not a new amendment has the effect of reducing benefits "all 'features of the benefit formula' that may enhance a plan participant's benefit . . . must be considered in determining a plan participant's 'accrued benefit' under the pre-amendment plan." 266 F.3d at 1029 (Paez, J., dissenting).

"has the effect of . . . reducing" the participants' early retirement benefits, it plainly violates the anti-cutback rule. ERISA § 204(g)(2), 29 U.S.C. § 1054 (g)(2).

Even more egregious than the month-by-month deprivations of benefits here, under some plans' suspension of benefit rules, the loss of benefits is not limited to the time during which the retiree is re-employed. For example, the plan at issue in *Spacek v. Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), imposed a minimum loss of *six months* of early retirement benefits regardless of the duration of the proscribed employment. 134 F.3d at 286. Thus, when a plan amendment expanded the definition of prohibited employment, the amended rule not only suspended Spacek's benefits during the time that he was actually working, but also *penalized* him for having accepted re-employment for even a short period of time. Here, as the Seventh Circuit noted, although there is no comparable penalty, the benefits lost during the period of newly prohibited employment will never be recovered by Respondents. *Heinz*, 303 F.3d at 806. Thus, the total benefits that Heinz and Schmitt will receive during their lifetimes will be less than the total they would have received absent the 1998 Amendment; i.e., their benefits have been reduced permanently.

B. Participants Who Fulfill the Terms and Conditions for Early Retirement Benefits Must Actually Receive the Promised Benefits.

As the Seventh Circuit observed (*Heinz*, 303 F. 3d at 812), its opinion is consistent with other decisions holding that once a participant fulfills the required conditions to obtain benefits, a plan may not change those conditions in a manner that causes the participant to lose all or a part of those benefits. "ERISA protects the benefits described in the Plan by ensuring that, if a pensioner is promised a

benefit and fulfills the conditions required to receive it, the pensioner will actually receive *the described and promised benefit*." *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992) (emphasis added).

The *Heinz* decision is consistent, furthermore, with the analysis in other decisions interpreting ERISA's anti-cutback rule. In *Michael*, the Ninth Circuit held that a plan amendment violated ERISA by changing the conditions regarding re-employment. 266 F.3d at 1028-29. The plan in effect at the time of Michael's initial early retirement provided that benefits paid would not be used as an offset against any additional benefits accrued during subsequent re-employment. *Id.* at 1025. However, the plan was amended to change the conditions for offsets, and application of the amendment to Michael resulted in a substantial loss of accrued benefits at the time of his second retirement. *Id.* at 1027.[6] *See also Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1464-66 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985) (holding that a plan's "living pension" feature, pursuant to which retirees' benefits might increase after their retirements if there were increases in the wage rates of those employees working in the retirees' former job

[6] *See also Bellas v. CBS, Inc.*, 221 F.3d 517, 525-26, 532 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001) (relying on Senate Report on REA, S. Rep. 98-575, 98th Cong., 2d Sess. at 28 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574, in finding that benefits accrue "upon their creation rather than upon the occurrence of the unpredictable contingent event"; therefore, as long as the employee meets the plan's *conditions* for a subsidized early retirement benefit (a "retirement-type subsidy" protected by Section 204(g)) before or after the date of an amendment, the benefits accrued up to the date of the amendment cannot be eliminated or reduced).

classifications, was part of the accrued benefit that could not be eliminated by an amendment).[7]

II. The Fifth Circuit's *Spacek* Decision Is Misguided.

In *Spacek*, the Fifth Circuit reached a contrary conclusion.[8] The *Spacek* panel found that Congress used "suspension" and "reduction" in "distinct ways"; therefore, the panel determined that any suspension of a retiree's benefits, even if it is based on new terms introduced by amendment after the retiree's benefits commence, does not reduce the retiree's benefits and therefore does not violate the anti-cutback rule. 134 F.3d at 288-89. The *Spacek* court relied on the inclusion of the term "suspension" in addition to "reduction" in certain sections of ERISA Title IV (which covers plan terminations), on an unrelated regulation applicable to plans that require employee contributions, and on what it characterized as the legislative history of REA. *Id.* at 289-90.

The Fifth Circuit concluded that interpreting "reduction of benefits as including suspension of benefit payments would make the word 'suspension' redundant in all of these [Title IV's] statutory provisions and interpretive

[7] Although *Shaw* involved normal retirement benefits, rather than early retirement benefits, and did not take into account the changes enacted by Congress in REA, its logic applies equally to early retirement benefits that are now protected by REA.

[8] The result in *Whisman v. Central States, Southeast & Southwest Pension Fund*, 55 F.3d 1140, 1148 (6th Cir. 1995), does not conflict with the Seventh Circuit's decision in *Heinz*. In *Whisman*, the Sixth Circuit found that "the result *would have been the same*" for the retiree under the pre-amendment suspension rule, 55 F.3d at 1148 (emphasis added); therefore, the discussion which distinguished a reduction in accrued benefits from a suspension was dicta.

regulations." *Spacek*, 134 F.3d at 289. In so holding, the Fifth Circuit overlooked two alternatives that would have negated its analysis: (1) that suspensions of benefit payments are a subset of reductions under Section 204, which in other contexts, Congress needed to mention separately; and (2) that suspensions of benefit payments can have the "effect of . . . reducing" early retirement benefits. ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2).

The *Heinz* majority reviewed each of the Fifth Circuit's arguments and found them unpersuasive. 303 F.3d at 807. Although the distinctions on which the Fifth Circuit relied make for interesting debate, they should not trump the straightforward meaning of the statutory phrase "which has the effect of . . . reducing early retirement benefits" in ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2), or the stated purpose of ERISA to ensure that workers received "anticipated benefits." ERISA § 2(a), 29 U.S.C. §1001(a).

A. ERISA Title IV Does Not Indicate that Reductions of Benefits and Suspensions of Benefit Payments Are Mutually Exclusive Categories.

The *Spacek* panel found that ERISA Title IV's plan termination provisions distinguish between a "reduction" of benefits and a "suspension" of benefit payments. 134 F.3d at 288-29. The panel concluded that the inclusion of amendments to suspension of payment provisions within Section 204's prohibition on decreases in accrued benefits would render the references to suspension of benefits in the plan termination title of ERISA "redundant." *Id.* at 289. However, as *Heinz* explained, "[o]ur interpretation of the anti-cutback rule does not suggest that *all* suspensions are 'reductions' (or vice versa), only that *if* the suspension is pursuant to an amendment that reduces benefits (attributable to service before the amendment), then

it is a reduction within the anti-cutback rule." *Heinz*, 303 F.3d at 807 (emphasis in original).

Indeed, the plain words of ERISA § 204(g) and ERISA Title IV support the conclusion that an amendment resulting in a suspension of benefits may have the effect of *reducing* early retirement benefits. As discussed above, ERISA § 204(g) provides that benefits may not be decreased by amendment "other than an amendment described in section 302(c)(8) or section 4281." ERISA § 4281(d)(1) provides that when a terminated multiemployer plan reaches insolvency, "payments which are not basic benefits shall be *suspended* . . . to the extent necessary to *reduce* the sum of such payments [to certain levels]." 29 U.S.C. § 1441(d)(1) (emphasis added). Thus, in Title IV, Congress recognized that suspensions of benefits may *have the effect of* reducing payments to retirees.

Another regulation the Secretary of Treasury issued under ERISA's anti-cutback rule, 26 C.F.R. § 1.411(d)-3(b), further supports the Seventh Circuit's conclusion that the anti-cutback rule encompasses any amendments to the suspension provisions that have the effect of reducing benefits. This regulation provides that in determining whether an accrued benefit has been reduced by a plan amendment, "all the provisions of a plan affecting *directly or indirectly* the computation of accrued benefits which are amended with the same adoption and effective dates" must be considered together. 26 C.F.R. § 1.411(d)-3(b) (emphasis added). Accordingly, in describing the provisions of a plan that must be considered in determining whether an amendment or group of amendments has the effect of reducing benefits, the Treasury regulations require the plan to take into account both direct and indirect effects. Even if a change in suspension rules cannot be characterized as a *direct* reduction in benefits because it is conditional, rather than absolute (i.e., a retiree's payments are only reduced *if* he or she engages in the

newly-prohibited employment), such a change certainly works an *indirect* reduction and, therefore, has the effect of reducing accrued benefits.

B. A Regulation Applicable to Plans that Require Employee Contributions Does Not Relate to the Scope of the Anti-Cutback Rule.

The *Spacek* court (*see* 134 F.3d at 290), also relied on a Treasury Department regulation addressed to defined benefit retirement plans that require employee contributions (which is a relatively unusual requirement these days). The regulation provides, *inter alia*, that plans requiring employee contributions need not actuarially adjust the participant's accrued benefit following a suspension of benefits *permitted* under ERISA Section 203(a)(3)(B). 26 C.F.R. § 1.411(c)-1(f). A thorough review of the Treasury Department regulation, however, shows that it never addresses whether suspensions are, or are not, a type of reduction. *Id.* In addition, neither the plan in *Spacek* nor the Central Laborers' Plan at issue here requires employee contributions; thus, the Treasury Department regulation is inapplicable.

Moreover, the regulation cited by the *Spacek* court does not relate to whether a *change* in a plan's suspension rules *has the effect of* reducing early retirement benefits. As Judge Williams wrote for the *Heinz* majority, "[t]o say that a *suspension* is not a forfeiture (or does not decrease accrued benefits) is not the same as saying that a *change* in the rules governing suspensions cannot decrease accrued benefits." 303 F.3d at 812 (emphasis in original).

C. The Spacek Court's Use of Ambiguous Legislative History Is Inconsistent with this Court's Precedents.

When statutory language is plain and unambiguous, there is no reason to resort to legislative history. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Because the language of Section 204(g)(2) prohibits a plan amendment that "has the effect of . . . reducing" early retirement benefits, resort to the legislative history is not needed. Nevertheless, in *Spacek*, the Fifth Circuit relied on one sentence from a floor statement on REA. 134 F.3d at 289-90. Specifically, the panel relied on a remark by Representative William Clay, made three days *after* the Senate passed the bill, that the amendment to Section 204(g) would not affect "'the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.'" 134 F. 3d at 289 (quoting 130 Cong. Rec. 23,487 (Aug. 9, 1984)). This notion is not reflected in any other part of the legislative history, including the Senate Report that contains the most comprehensive description of Congress' intent. *See Heinz*, 303 F.3d at 809-10; S. Rep. 98-575, reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2573-74.[9]

In addition, the *Heinz* majority found Representative Clay's statement ambiguous as to whether it meant (1) that the amended anti-cutback rule would allow multiemployer plans to change the suspension rules as to benefits that already have accrued (the Fifth Circuit's conclusion), or (2) that the amended rule would allow the plans to

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[9] One member of Congress does not have the power to change the meaning of the statutory text by making a statement in the Congressional Record. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (noting that "the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"). When statutory language is plain, resort to legislative history is often like "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

change the rules only for benefits that accrue after the amendment. *Heinz,* 303 F.3d at 809-10. Accordingly, the Seventh Circuit concluded that this lone sentence of legislative history was unpersuasive. *Id.* at 810. As this Court recently reiterated in a similar situation, "[f]loor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text." *Barnhart*, 534 U.S. at 457. Coincidentally, in *Barnhart*, the House already had passed the bill at issue three days before the two Senators in question spoke. *Id.* at 457 n. 15. Here, the Senate passed the bill three days before Representative Clay spoke, and the Senate Report on the legislation contains no indication of the legislative intention that the Fifth Circuit inferred from his ambiguous remark. *Heinz*, 303 F.3d at 810 n. 13.

III. ERISA Should Be Interpreted, Where Reasonable, to Protect the "Reasonable Expectations" and "Anticipated Benefits" of Participants.

In enacting ERISA, Congress incorporated into the statute itself the finding that employees "are losing anticipated retirement benefits." ERISA § 2(a), 29 U.S.C. § 1001(a). Congress also required that plan terms be embodied in governing documents that "specify the basis on which payments are made . . . from the plan," and it required that plan fiduciaries follow the terms of such documents. ERISA §§ 402(b)(4), 404(a)(1)(D), 29 U.S.C. §§ 1102(b)(4), 1104(a)(1)(D).

The "anticipated benefits" and reasonable expectations of participants include the terms and conditions under which they may work while continuing to receive their pension payments. Those terms and conditions are an

integral part of the benefits themselves. While nothing in ERISA prevents plans from changing the terms and conditions applicable to future benefit accruals, such changes cannot be imposed on benefits already accrued by participants in reliance on certain plan terms.

Although Heinz and Schmitt may not fit everyone's image of pensioners, having been near age 40 when they retired, the outcome of their case affects hundreds of thousands of retired participants in multiemployer plans—those who spend most of their working lives in the same industry but, by their 40s, 50s, or early 60s,[10] are unable to work any longer in covered employment due to injuries or the toll the work has taken on them generally. When they can no longer work in covered employment, these workers often turn to supervisory jobs to earn additional money to ensure that they and their families have sufficient funds to support themselves currently and to put aside funds for the future when they can no longer work at all. These workers often lack the training and experience to obtain employment in *other* industries and are likely to face barriers to being hired in many occupations due to age. Nonetheless, they are sometimes able to move into supervisory or other permissible positions within the industry in which they have experience. In this way, these workers can supplement their benefits with earned income for as long as possible, enhancing their financial security for the rest of their lives.

Petitioner and its *amici* have accused such workers of "double-dipping," arguing that pension benefits should

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[10] *See, e.g., Whisman*, 55 F.3d at 1143 (participant retired from the trucking industry at age 49 and began working for the United States Postal Service as a "'flexible' employee"); *Spacek*, 134 F.3d at 286 (participant retired at age 51 after working for 30 years in the longshore industry and began working as a superintendent for a stevedore company).

not be used as supplemental income. *See* Brief of the Central States, Southeast and Southwest Areas Pension Fund as *Amicus Curiae* in Support of Petitioner at 2, 7 ("Central States Br."); *Amicus Curiae* Brief for the Society for Human Resource Management Supporting Petitioner at 2, 7; Brief for the National Coordinating Committee for Multiemployer Plans, *et al.*, as *Amicus Curiae* Supporting Petitioner ("NCCMP Br.") at 17-18, 27. While this may have served as a smear in the past, society has moved beyond the idea that public policy is served by discouraging retirees from returning to work. For example, pursuant to the Senior Citizens' Freedom to Work Act of 2000, 106 Pub. L. No. 182, 114 Stat. 198 (2000), recipients of Social Security now suffer no reduction in benefits if they continue to work upon reaching full retirement age. *See* 42 U.S.C. §§ 402, 403, as amended by 106 Pub. L. No. 182, 114 Stat. 198 (2000).

Moreover, the "double-dipping" argument fails to recognize the practical reality that increasingly, many people in the United States, particularly those between the ages of 55 and 64, continue to work following retirement. Thirty-seven percent of men in the United States in this age group who received income from pension benefits or retirement savings in 1999 were employed full or part time in March 2000, "an increase of more than four percentage points over the comparable rate in 1994, when it was 32.5 percent." Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, Monthly Labor Review, Vol. 123, No. 10, October, 2000, at 23, *available at* www.bls.gov/opub/mlr/2000/10/art3abs.htm. *See* Diane E. Herz, *Work After Early Retirement: An Increasing Trend Among Men*, Monthly Labor Review, Vol. 118, No. 4, April 1995 at 14, *available at* www.bls.gov/opub/mlr/1995/04/art2abs.htm (finding similar trend between 1984 and 1993). Similarly, thirty-one percent of women aged 55 to 64 who were employed in March 2000 had received pension or retirement income in 1999. *See* Purcell, Monthly Labor Review, Vol. 123, No. 10, at 23.

As a result, today's retirement planning often takes into account expected income from post-retirement employment. *See*, *e.g.*, Fred Brock, RETIRE ON LESS THAN YOU THINK, THE NEW YORK TIMES GUIDE TO PLANNING YOUR FINANCIAL FUTURE AND HOW TO DIFFUSE IT, 18-19 (Times Books 2004); Ed Slott, THE RETIREMENT SAVINGS TIME BOMB, 37 (Penguin Books 2003). Indeed, it is just such planning that would be frustrated by the interpretation of the anti-cutback rule urged by Petitioner and its *amici*. Thus, an employee who is considering retirement from his or her job (and from all other jobs covered by the multiemployer plan) will calculate expenses and decide that the combination of an unreduced early retirement benefit and anticipated work in a new job of a type that the plan allows will enable him or her to meet those expenses (and, perhaps, put aside additional funds for the day when he or she will not be able to work at all). To allow a plan to change the rules after retirement would fly in the face of ERISA's protection of participants' legitimate expectations.[11]

As employees age and accrue benefits under pension plans, they are more likely to begin the process of planning

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[11] Consistent with the notion of allowing workers to plan for their retirement, the Secretary of Labor has promulgated a regulation giving participants the opportunity to obtain prospective information as to the potential application of suspension of benefit rules to particular jobs. 29 C.F.R. § 2530.203-3(b)(6). The regulation requires plans that have suspension of benefit rules to provide a procedure for employees to request an advance determination of whether specific post-retirement employment will trigger suspension rules. *Id.* The purpose of this regulation is to assist participants in making informed decisions *before* they retire.

for their retirements. Relying on plan rules that allow them, for example, to work as supervisors after their retirements, they may decide that they can forego savings out of their wages because they will be able to receive their retirement benefits and simultaneously engage in such employment. If, after such an employee has worked 29 of the 30 years necessary for an unreduced early retirement benefit, a plan is allowed to change the rules, then it will be too late for the worker to make up for these lost opportunities to save for his or her twilight years.

Petitioner's *amici* assert that changes in the labor market make it unlikely that plan participants have any expectations about the availability of post-retirement employment. *See* Central States Br. at 4, 9. However, this argument overlooks the practical reality, discussed above, that post-retirement employment is increasingly common and often is necessary to supplement retirement income. *See also, e.g., Logrande v. Local 851 Employer Group Pension Plan*, 695 F.Supp. 92, 92-93 (E.D.N.Y. 1988) (participant forced to return to work after retiring at age sixty-four because his pension was insufficient to support son who had contracted AIDS).

Petitioner's *amici* also argue that participants have control over whether to remain in prohibited post-retirement employment after a change in suspension rules. *See* Central States Br. at 9. However, this argument misses the point. Retirees cannot unwind their retirements and return to covered employment if the suspension rules are changed. The only real control that participants can exercise is to engage in informed planning for their retirements and to make informed decisions as to retirement based on that planning. Participants must be able to evaluate their expected post-retirement income based on the terms of the plan, *including* the re-employment suspension rules which allow them to engage in certain types of post-retirement employment.

Petitioner's *amici* raise a series of additional policy arguments in attacking the Seventh Circuit's ruling. *See, e.g.*, Central States Br. at 7 (suspension of benefit rules ensure that non-union non-contributing employers, which do not make pension contributions for employees already receiving pension benefits, do not receive an unfair advantage over contributing union employers); Central States Br. at 4, 8; NCCMP Br. at 4-6, 12, 14-15, 17-18 (applying expanded suspension of benefits rules to those who already have accrued pension benefits allows plans to protect their actuarial health and respond to fluctuations in the labor market); NCCMP Br. at 26-27 (if plans are unable to adequately ensure their actuarial health, they will have difficulty attracting new participating employers).

Although fluctuations in the labor market, the performance of plan assets, and competition with non-union non-contributing employers are legitimate concerns, Petitioner's *amici* fail to explain why the burden of compensating for such factors should fall on individual plan participants who already have accrued benefits under a set of rights and expectations and who, because of their relatively advanced ages, will be unable to recover from the loss of anticipated post-retirement income. Indeed, the argument of these *amici* could be used to support a reduction in any plan participant's accrued benefits of any type. However, Congress, which was quite cognizant of plan funding issues,[12] nevertheless enacted the anti-cutback rule and expanded it in 1984.

ERISA expressly provides for an exception to the anti-cutback rule in cases of "substantial business hardship."

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[12] The legislative history is replete with testimony about failures of underfunded plans, such as Studebaker's. *See Nachman v. PBGC*, 446 U.S. 359, 375 n. 22 (1980) (quoting 1973 floor statement by Senator Harrison Williams, a chief sponsor of the Senate version of ERISA).

ERISA §§ 302(c)(8) and 303(b), 29 U.S.C. §§ 1082(c)(8) and 1083(b).[13] Unlike individual participants, plans thus have a mechanism, built into ERISA, which allows them to respond to labor and market fluctuations. The Plan claims no such hardship here.

Furthermore, Petitioner's *amici* provide no support for the argument that the Seventh Circuit's ruling will benefit non-union employers to the detriment of union employers. *See* Central States Br. at 7. As set forth above, retired plan participants, such as Heinz and Schmitt, often are re-employed as supervisors for unionized employers, rather than as rank-and-file employees of non-unionized employers. *See also Spacek*, 134 F.3d at 286. Even if they are employed as supervisors for non-union employers, they are not taking away potential union jobs or reducing the potential contributions to the multiemployer plan. It is well-established that supervisory positions are non-union positions, *see* 29 U.S.C. § 157 (affording employees the right to organize); 29 U.S.C. § 152(3), (11) (distinguishing supervisors from employees).[14]

Conclusion

Multiemployer pension plans should not be allowed to pull the financial rug from under their participants by changing rules governing the availability of pension

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[13] See Section I, above, with respect to the specific test to meet this exception.

[14] Petitioner's *amici* provide no support for their contention that plans will have difficulty attracting new participating employers if the plans are unable to adequately ensure their actuarial health. *See* NCCMP Br. at 26-27. It is doubtful that employers who enter into pre-hire construction labor agreements give any consideration to the structural integrity of the pension funds prior to executing such agreements.

benefits after employees have earned the rights to those benefits.

Participants who earn a right to benefits in reliance on a specific definition of prohibited re-employment justifiably anticipate that they will be able to return to employment in specific positions that are not proscribed under the terms of the plan. Participants cannot engage in financial planning to ensure their families' security during their retirements if the circumstances under which they can receive pension benefits can be restricted at a later time. This is precisely the type of problem that ERISA's anti-cutback rule was intended to address.

Respectfully submitted,

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